

**EVOLVING TRENDS IN TOXIC TORT LITIGATION:  
2008 AND BEYOND**

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**By:**

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## Curriculum Vitae

**Kurtis B. Reeg** is the President and Managing Partner of Reeg & Nowogrocki, LLC, in St. Louis, MO, having served as the National Chair of the Products Liability Group of one of the nation's largest law firms. For twenty-nine (29) years, Mr. Reeg has focused his litigation practice in the fields of toxic torts, products liability, insurance, environmental law and alternative dispute resolution. Mr. Reeg is a member of the Defense Research Institute (DRI), the Federation of Defense and Corporate Counsel (FDCC) (former chair of the Toxic Torts and Environmental Law Section), the International Association of Defense Counsel (IADC), the ABA, the Missouri and Illinois Bars, and has published numerous articles and spoken at many meetings and seminars for these organizations. He is also a sustaining member of the prestigious Product Liability Advisory Counsel (PLAC), made up of member Fortune 500 manufacturing companies and their select trial and appellate counsel. He has numerous reported cases to his credit, and was the recipient of the FDCC's 2001 Andrew C. Hecker Award for the most outstanding article in the Federation's *The Quarterly*.

Over the years, Mr. Reeg has represented clients in more than 20 states before their state and federal courts. He serves as National and Regional Coordinating Counsel for various clients and has been involved in several landmark cases, including: the W.R. Grace nationwide asbestos insurance coverage litigation in the federal courts of New York, in which he prevailed in the U.S. District Court and Second Circuit Court of Appeals; the ground-breaking and massive Minnesota Landfill direct action case against the insurance industry, State of Minnesota v. Allstate Insurance Co., et al.; and the nationwide Burlington Northern noise-induced hearing loss coverage cases in St. Clair County, Illinois.

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This paper is the basis for a Panel Discussion on "Preparing for a New Generation of Toxic Tort Claims" to be held at the TT&EI Section Meeting on August 1, 2008.

The Panelists are expected to be:

- **David R. Erickson**, Shook, Hardy & Bacon, LLP, Kansas City, MO.;
- **Daniel J. Gerber**, Rumberger, Kirk & Caldwell, P.A., Winter Park, FL.;
- **Kurtis B. Reeg**, Reeg & Nowogrocki, LLC, St. Louis, MO.;
- **David M. Nicholas, Sr.** Litigation Counsel, Tyco International, Boca Raton, FL.;

## ***“Evolving Trends In Toxic Tort Litigation: 2008 and Beyond”***

**By: Kurtis B. Reeg ©**

The plaintiffs' bar and their behind-the-scenes interest and advocacy groups continue to gin up phony science and promote it to the media in an effort to generate unfounded litigation and unfairly sway judges and prospective jurors. The continuing attacks are not only directed at Corporate America and the insurance industry, but at government regulatory authorities who are mandated by law to supervise and regulate various industries and product lines. The attacks, financed in part by well-heeled plaintiffs' counsel, are being fronted by academics and advocacy groups who pretend to have nothing but legitimate science and the best interests of the consuming public at heart. The truth is that for the sake of name recognition and research funding (which they need to maintain their academic status at their respective institutions), many of these academics are churning up junk science, hiding behind their degrees, all the while purveying alternative, litigation-driven agendas in hopes of subsequently receiving more funding and being involved in the litigation which they are shamelessly promoting.

The topics of these campaigns are varied. The tactics employed, however, seem to run a now fairly predictable course. Defense counsel and their corporate and insurance clients need to recognize this pattern of engineered litigation and decide at the beginning to launch dual fights against both the counterfeit science and contrived litigation. This paper addresses some of these evolving trends and topics of litigation which are spreading across the country. It focuses on the kind of hyped media and web site reporting that is being consumed by the general public and prospective jurists and jurors, so the defense community can appreciate the nature and depth of the litigation panic being spread by the opposition. Neither this paper, the author, nor the clients of the author's firm should be considered to put stock in the erroneous allegations and theories discussed in this paper.

### **I. CHEMICALS IN PLASTICS**

Two common chemicals are found in plastics we use almost every day. Polycarbonate bottles, shampoo containers, car interiors, cosmetics, canned food and baby products are recent subjects of several studies examining the side effects of **bisphenol A (BPA)** and **phthalates**. The chemicals are used to achieve radically different results. Bisphenol A “is used to make plastics clear, strong and shatter-resistant.” ‘Everywhere Chemicals’ In Plastics Alarm Parents, USA Today, October, 30, 2007. Phthalates, meanwhile, are used to “make plastics soft and flexible.” *Id.* The health concerns over the two, however, are quite similar. Certain animal studies have shown an association between these alleged “endocrine disruptors” and adverse hormonal effects, including reproductive and developmental problems. ‘Endocrine Disruptor’ Won’t Be On the Label, USA Today, October 30, 2007. Yet, as we all know, there is a substantial difference between animal studies, whether *in vivo* or *in vitro*, and human health effects.

### A. Bisphenol A (“BPA”)

As mentioned, BPA renders plastic into hard and clear polycarbonate and is commonly found in consumer products such as water and baby bottles. As of late, BPA is under heavy scrutiny by media and scientists alike because, allegedly, as “an environmental estrogen... it can mimic the effect of sex hormones on the body... [A]nimal tests show that BPA affects reproduction and brain development.” Heat Causes Chemical to Leach From Plastic, USA Today, 1/30/07. Health Canada recently announced its intention to “ban the importation, sale and advertising of polycarbonate baby bottles” due to the health risks they pose to infants.

[http://www.chemicalsubstanceschimiques.gc.ca/challenge-defi/bisphenol-a\\_fs-fr\\_e.html](http://www.chemicalsubstanceschimiques.gc.ca/challenge-defi/bisphenol-a_fs-fr_e.html). In addition to exposure from polycarbonate bottles, an expressed concern is that infants can be exposed via cans of baby formula, which might be lined with BPA. *Id.* The greatest risk of BPA transfer occurs at high temperatures; when scientists filled new and used polycarbonate bottles with boiling water, “they released BPA up to 55 times more rapidly than before heating.” Heat Causes Chemical to Leach From Plastic, USA Today, 1/30/07. Based in part on a drumbeat of concern over BPAs, one popular manufacturer of polycarbonate water containers recently issued the following statement: “In response to consumer demand, Nalgene® will phase out production of its outdoor line of polycarbonate containers that include the chemical Bisphenol-A (BPA) over the next several months”. [http://www.nalgene-outdoor.com/PDFs/08NAL\\_BPA\\_PR.pdf](http://www.nalgene-outdoor.com/PDFs/08NAL_BPA_PR.pdf).

A definitive study of BPA exposure on humans has not yet been conducted; thus, the reactionary response of the Canadian Health authorities seems unwarranted, and is certainly not health-based. Perhaps in response to Health Canada’s proposed ban on BPA in certain consumer goods, the U.S. Food and Drug Administration (“FDA”) recently announced that it considers all products containing BPA safe to use – even baby bottles. FDA: Products With BPA Are Safe to Use, USA Today, 5/15/08. Watch for further investigations in the near future; the Agency has been criticized for relying on two possibly flawed studies, and admits that they are “reviewing safety concerns about the chemical.” *Id.*

As a final note, BPA litigation has started to pick up. In a Missouri lawsuit filed on April 30, Defendant New Wave Enviro Products was sued for claims under the Missouri Merchandising Practices Act, strict products liability for design or manufacturing defect, strict products liability for failure to warn, and breach of implied warranty. No specific personal or bodily injuries from the use of defendant’s products have been alleged, only that she and the class members have “suffered significant damages.” Hatter v. New Wave Enviro Prod., (W.D.Mo., Filed April 30, 2008). More recently, on May 1, 2008, five companies that manufacture and sell baby bottles, bottle liners and training cups were sued in a class action filed in Kansas. Plaintiffs claim that consumers in the State of Kansas would not have purchased plastic baby bottles, bottle liners and training cups containing BPA had they known the health risks involved with the chemical. Plaintiffs allege both intentional and negligent misrepresentation, along with violation of the Kansas Consumer Protection Act. Wilson v. Avent Am., Inc., (D. Kan., Filed May 1,

2008). These lawsuits both use the listing found in the National Toxicology Program (“NTP”) as a basis to contend that the available body of scientific evidence supports their litigation. This author and this Section have previously addressed the significance of the NTP in toxic tort litigation.

## **B. Phthalates**

Phthalates are chemicals that are used to soften plastic and are found in vinyl, toys and personal and health care items like shampoo and lotion. Similar to BPA, phthalates allegedly disrupt hormones and, according to the FDA, pose a health risk to “newborn boys, women pregnant with boys, and boys just entering puberty.” ‘Everywhere Chemicals’ in Plastics Alarm Parents, USA Today, October 30, 2007. An interesting feature of the chemical is its ability to be absorbed through the skin (dermal exposure). A recent study found higher concentrations of phthalates “in infants who were exposed to lotion, powder and shampoo than in other infants.” Baby Powder, Shampoo Linked to Chemical Risk, USA Today, February 3, 2008. Cosmetic and health care products for adults and infants alike are of concern, although the keenest interest by the Government has been directed at infants and young children. The United States Environmental Protection Agency (“EPA”), which otherwise has a transparent, science-driven and health-based protocol for analyzing such issues, has determined that a common phthalate, DEHP, “is a probable human carcinogen... [purportedly] based entirely on liver cancer [found] in rats and mice.” <http://www.atsdr.cdc.gov/tfacts9.html>. While the EPA does not usually make such a finding based on limited animal evidence, there is a growing negative ground-swell with respect to phthalates.

The current mindset regarding phthalate regulation seems to be driven by a “worst case scenario” approach. Since 2004, phthalate use in the European Union has been banned in toys and other products intended for children under the age of three. However, the EU does not regulate based on a science or health-based method, but operates out of over-abundance of paranoia and caution which it euphemistically calls the “precautionary” principle. This can be demonstrated by the fact that the phthalate ban was issued even though the “research commissioned by the European Union’s own executive branch, the European Commission, had already concluded that the chance of a child exceeding the recommended limits through exposure to such products was *‘so rare that the statistical likelihood cannot be estimated.’*” <http://www.phthalates.org/pdfs/WhyEUBannedPhthalates.pdf>. A similar law has been passed in California, which has its own unique standards and methods of dealing with products and chemicals. Another recent California law, which may set the table for other state lawmakers, is the Safe Cosmetics Act of 2005. This disclosure law, against which cosmetic and chemical companies heavily lobbied, “requires cosmetics manufacturers to disclose to the state any product ingredient that is on state or federal lists of chemicals that cause cancer or birth defects.” <http://www.safecosmetics.org/newsroom/press.cfm?pressReleaseID=13>.

It is not surprising that litigation has been filed in California over phthalates. The Center for Environmental Health (another advocacy group which sports itself as a well-

meaning, science-based consumer protective group) has filed suit against Apple, claiming that the iPhone contains a level of phthalates in violation of California law and that pregnant women who use the product could be putting their unborn children at undue risk. <http://blog.wired.com/business/2007/10/apple-now-in-le.html>.

The author believes that the future of phthalates will be driven more by legislative changes than litigation. So far, only the European Union and California have gone so far as to completely ban phthalates from children's goods, but thirteen states are considering similar bans. Toy Safety Steps Back Into National Spotlight, USA Today, March 20, 2008. A federal law covering the chemical seems possible as well. A spokeswoman for Wal-Mart was recently quoted as saying that "her company supports federal legislation on phthalates because it's easier to follow one national standard than many different state laws." *Id.* The extant, legitimate science would not seem to support the complete banning of phthalates in cosmetics, beauty care or infant products, and the future path of phthalates will likely be a tortured one. Product manufacturers, their insurers, and their legal counsel should be alert to state, federal, legislative, regulatory and litigation movements in this area.

## II. QUESTIONABLE CHINESE IMPORTS

### A. Lead in Children's Toys

Between BPA, phthalates and lead-tainted toys, one might think that being a kid is quite dangerous today. Toy safety has again emerged as a hot topic in the national media – in part because of the recent California law prohibiting phthalates, and also because of the foreseeable lawsuits that followed last summer's spree of toy recalls. Now, Congress is prepared to discuss a bill that would realize "the first major overhaul of consumer product safety laws in a generation – including a virtual ban on lead in toys, something never tried before." Congress is Ready to Get the Lead Out of Kids' Toys, Minneapolis Star Tribune, May 3, 2008. The bill has generated plenty of bipartisan support and will put serious financial and quality control (QC) pressure on both manufacturers and vendors. One possible manifestation of this chronic toy recall path could be higher standards even retailers themselves are implementing on their own accord. For instance, Toys 'R' Us has announced plans to enforce a voluntary standard for lead in toys tighter than the mandatory federal standard," which standard is set by the Consumer Product Safety Commission (CSPC). <http://www.ombwatch.org/article/blogs/entry/4639/18>. Similarly, heightened standards have also emerged from retail giant Wal-Mart. By getting ahead of "expected new federal legislation," these toy sellers are hoping to minimize long-term effects on sales, causing the short-term burden to likely fall on manufacturers and consumers as well. Cost of Making Toys in China Rises, St. Louis Post-Dispatch, February 16, 2008.

### B. Blood Products Contamination

David Kessler, the well known former commissioner of the FDA, was anything but surprised when he heard about the latest contamination crisis involving Chinese imports.

This time it did not pertain to toys but the pharmaceutical/medical product heparin, a blood thinner used in hospitals that has been associated with allergic reactions responsible for 19 deaths since 2007. The FDA concluded that “a chemical probably derived from cow trachea and pig ears was used to adulterate batches” of the anticoagulant prior to its sale to Baxter International, based out of Deerfield, Illinois. Altered Heparin Linked to Deaths, USA Today, March 20, 2008. Kessler waxed that the news of contamination should not have stunned anyone: “China is ‘as close to an unregulated environment as you can get.’ In fact, it’s a lot like the USA was in 1906, he says – ‘that’s why we developed an FDA.’” *Id.* Whatever the state of Chinese regulatory/inspection/QC standards may be, reports of contaminated imports from China are becoming more prevalent across many different product lines. Exacerbating the problem is the sheer lack of manufacturer or FDA presence, much less control, in China. Manufacturers rely mainly on foreign employees or third party representatives to enforce compliance with design, government and import standards/regulations: essentially, the fox is guarding the hen house! At the time of the heparin investigation, the Agency had only two staffers in China. However, in light of the recent media storm surrounding this and similar cases, the FDA has received approval to increase the number of full-time employees stationed in China to eight over the next 18 months. “FDA Takes Next Step in Establishing Overseas Presence”. March 13, 2008. <http://www.fda.gov/bbs/topics/NEWS/2008/NEWS01806.html>. Such a miniscule increase in people-power in a nation as large as China is likely to be meaningless in terms of real world change.

### C. Other Products

In most cases, contamination perplexities among Chinese producers result from using low-priced, unsafe alternatives as component or constituent parts. China has repeatedly supplied the U.S. market with products that fail to meet most varieties of international standards. In a vast array of goods, the cheaper substitutions have resulted in widespread cases of severe allergic reactions, including a number of fatalities. In March, 2008, criminal charges were filed against two officials of a sales company accused of importing “90,000 tubes of Chinese toothpaste containing a poisonous substance, diethylene glycol, a chemical used in antifreeze... Chinese manufacturers used the chemical as a cheap alternative to glycerin, which thickens toothpaste.” Toxic Toothpaste Leads to Charges, USA Today, March 7, 2008. Toothpaste was one of three Chinese-specific exports blocked by the FDA in 2007, which effectively bans questionable foods and drugs until they are found to be safe again. Another Chinese export blocked in 2007 was contaminated vegetable proteins, such as wheat gluten, because it contained chemicals used as fertilizers. The pet food debacle was responsible for the largest pet-food recall in history. Healthy pets across the country began to suffer renal failure after eating the tainted food. Over 100 different brands of cat and dog food had to be recalled, and though no exact number of pet fatalities was ever tallied, the Veterinary Information Network reported its expectation that “the number of pet deaths linked to the contaminated food [would] be in the thousands – and the number of sick pets [would] be more than 10,000.” [http://www.consumeraffairs.com/news04/2007/04pet\\_food\\_recall21.html](http://www.consumeraffairs.com/news04/2007/04pet_food_recall21.html). The supplier

company is reportedly facing 90 class action law suits. Legislatures are also considering bills to change the status of pets from that of being mere personal property to authorizing a higher status that would permit lawsuits for actual damages and non-economic damages such as emotional distress. The pet food disaster will continue to yield litigation and AAE payments by insurers for several more years to come.

### III. THE (HIDDEN) DANGER OF SIDE EFFECTS

While exposure to contaminated medicine is one possible avenue to undesirable side effects, inadvertent, unfortunate consequences are not always the result of contamination. The FDA is examining Merck's best-selling drug, Singulair, following reports that it may cause deadly side effects. Based on reports of "mood changes, suicidal behavior and suicide in patients who have taken the popular allergy and asthma drug," the FDA has launched an inquiry provoked by anecdotal reports of four Singulair-related suicides. FDA Looks Into Link Between Merck Allergy Drug Suicide, Belleville News-Democrat, March 28, 2008. Merck recently placed warnings of suicide on the drug's label despite the company's emphasis that "none of the 11,000 patients enrolled in 40 Singulair trials has committed suicide." *Id.* The investigation has received a good deal of media attention – a Google search for Singular and depression returns over one million related websites – and it has raised questions about the thoroughness of the procedures employed in clinical studies, the main determinant used to evaluate drug safety in the U.S.

The Agency has, with respect to this product, reacted more quickly than normal in light of past complaints that it showed little hurry to notify the public about critical safety issues. It has improved its notification methods since "[being] criticized for acting too slowly on information about the risks of Merck's painkiller Vioxx and GlaxoSmithKline's diabetes pill Avandia" – it has chosen to promote safety, possibly even avoidance, and has progressively adopted a more open communication policy. Suicide Reports Lead to Allergy Drug Investigation, Edwardsville Intelligencer, March 30, 2008. The FDA's effort to announce and investigate reports of unfamiliar side effects, and even engage in recall campaigns, sometimes based solely on anecdotal evidence, will generate lawsuits and not only claims for defense and indemnity reimbursement for that litigation, but also claims for the costs of recalls as well. Lest one thinks that Singular was just an odd occurrence, another recent example of unforeseen psychological side effects in a pharmaceutical is the anti-influenza drug Tamiflu, for which the FDA in March, 2008, "issued a Medical Product Safety Alert ... [following] reports in Japan of children and teens experiencing convulsions, delirium and delusions after taking the drug. There have been five [fatalities] in Japan, mostly from falls as a result of neurological or psychiatric problems." FDA Issues Alert for Kids Taking Tamiflu, USA Today, March 5, 2008.

Merely receiving medication does not necessarily implicate that drug as the specific cause of troublesomeside effects, but media and litigation hype certainly escalate a litigious society's thirst for judicial activism, intervention and damage awards. Take the case of 2-year-old Emily Jerry of Ohio who died three days after "a pharmacy technician [who is not a medically-trained professional] at [the hospital] mixed Emily's

chemotherapy drug with a saline solution, [at a level] 26 times the 0.9% normally used and the pharmacist on duty didn't catch the mistake." Drug Error Killed Their Little Girl, USA Today, February 25, 2008. Since her death, the girl's parents have been campaigning for tougher standards that would include compulsory training and education for pharmacy technicians, "the workers typically responsible for entering prescriptions into computers, checking dosages and getting the correct drugs into medication containers." The pharmacist alleged to be ultimately responsible for Emily's death was indicted on charges of reckless homicide and involuntary manslaughter. *Id.* Despite the obvious unintentional mistake, the trial will occur later this year and may have significant ramifications in cases of medical negligence.

Legislators are taking note. House Representative Steven LaTourette of Ohio has dubbed his recent pharmaceutical standards bill "Emily's Act" and adds that "Americans would be a little bit dismayed if they knew that they and their loved ones were having drugs mixed for them by people who don't have any training requirements." *Id.* LaTourette claims the proposal has gotten support from actor Dennis Quaid, who went through a "nightmare last year when his twins were accidentally administered 1,000 times the normal dose" of the blood thinner Heparin. Boyd, Anna. "Dennis Quaid Supports Patients' Right to Sue Drug Makers." 15 May. 2008 <http://www.efluxmedia.com/action-print-id-17611.html>. Quaid had previously testified before a Congressional panel "on the issue of 'pre-emption,' under which FDA approval guarantees immunity for drug companies against state lawsuits" at which time he stated his strong belief that "if preemption of lawsuits is allowed to prevail, it will basically make all of us, the public, uninformed and uncompensated lab rats." *Id.* Such movie star and media hype fuels litigation and the tiresome Plaintiff mantra that litigation serves the public interest, serves as a check and balance against product manufacturers, insures that companies will design and manufacture the safest products possible, and, oh yes, promotes social justice and responsibility.

While at times certain medicines or products may truly fail, mere associations between a product and some untoward event or result often garner unwanted attention. One of the most recent and ironic examples is vaccines, which were and are intended to promote long-term health from infancy. Vaccines have been accused in the past several years and in recent lawsuits as being "the" catalyst behind and cause of the latest onset of autism in otherwise healthy children. Formerly considered a rare disorder, current rates have shown a noticeable increase: one in every 150 children suffers from autism. [http://foodconsumer.org/7777/8888/Other\\_News\\_51/051312482008\\_More\\_parents\\_claim\\_vaccine-autism\\_link.html](http://foodconsumer.org/7777/8888/Other_News_51/051312482008_More_parents_claim_vaccine-autism_link.html). Medical scientists are struggling to find a cause behind the increased incidence of the disease. Thimerosal, a mercury-based preservative used in vaccines, was initially touted as the culprit because the occurrence of autism had risen steadily along with the popularity of booster shots. However, according to a report in the January, 2008, issue of *Archives of General Psychiatry*, "autism cases continued to increase in California after Thimerosal was eliminated from childhood vaccines," forcing scientists to look at other explanations for the trend. <http://thedailygreen.com/environmental-news/latest/autism-vaccines-47010701>. This issue has raised apprehension and alarm among some parents in large part because our

nation's doctors, and rightfully so, have placed such an emphasis on the need to maintain children's vaccinations starting at a young age. Due to these concerns, there has been plenty of discussion in the popular media about the alleged link between immunizations and serious health problems. Even the popular ABC drama series *Eli Stone* "stirred a minor controversy with its pilot episode, which featured a case that linked autism with a vaccine." But All Involved Hope Series Lives, USA Today, April 17, 2008. This, coupled with the Vaccine Court's first award of damages to a young patient with autism (albeit that this was an extraordinary case with unique circumstances), continues to fan the flames of certain drug and medical device litigation. Manufacturers and their insurers are sure to continue to see a steady stream of drug-related litigation in the years to come.

#### IV. HORMONE THERAPY

In 2005, the National Toxicology Program added steroidal estrogens, commonly known as hormone replacement therapy, to its list of possible cancer-causing agents. Since that time, litigation has been increasing on behalf of women utilizing these medications. Despite manufacturers' expensive and Herculean efforts, mere compliance with FDA procedures is not enough to shield a product manufacturer from liability. For example, a jury in Reno, Nevada "awarded a total of \$35 million in compensatory damages and \$99 million in punitives" to three women who had taken the hormone therapy drugs Prempro, Premarin and/or Provera, all produced by Wyeth Pharmaceuticals. Nevada Woman Wins \$47.5 Million in Hormone Therapy, Lawyers Weekly, January 23, 2008. The pills, which are mainly taken by women to combat menopausal symptoms, carry a warning about the drug's increased risk of heart attacks, blood clots, strokes and breast cancer. However, the Madison, N.J.-based company has been the target of over 5,000 lawsuits nationwide because of its hormone drugs. *Id.* A recent study by the advocacy group Women's Health Initiative found that although patients taking Prempro for hormone therapy do have an increased risk for heart attacks, blood clots and strokes, the increased exposure to these side effects lessened after quitting, eventually returning to normal levels within two to three years. Even After Hormone Therapy, Risk of Cancer Remains, USA Today, March 5, 2008. Nevertheless, the patients' incidence of cancer remained 24% greater "among the women who had taken hormone therapy than among those given placebos," and the vast majority of this increase was determined to be a result of breast cancer. *Id.* Once again, the interplay between the NTP and other governmental regulations/listings and ongoing litigation cannot be overlooked. As this author has indicated in the past, the NTP is often used by the Plaintiff's bar as a roadmap for new litigation. When the revised NTP comes out every two (2) years, Corporate America, its insurers and counsel would be well-served by reviewing it for new listings and likely candidates for litigation.

## V. WATER CONTAMINATION

### A. Pharmaceuticals

Earlier in this spring of 2008, the Associated Press conducted an investigation into the pharmaceutical drug content of drinking water supplies across the U.S. The report, which naturally received national media attention, called the public's attention to what utility providers have known for some time: "antibiotics, anticonvulsants, mood stabilizers and sex hormones have been found in the drinking water supplies of at least 41 million Americans." U.S. Drinking Water is Laced With Drug Residue, St. Louis Post-Dispatch, March 10, 2008. Although the federal government does not yet employ safety limits or screening for drugs in drinking water, the Environmental Protection Agency ("EPA") takes the view that "trace amounts of pharmaceuticals in drinking water pose little risk," according to the results of research released in April 2008. New Research Findings Bolsters EPA View on Low Risks From Drugs in Water, Environmental Newsstand, April 28, 2008. The Agency's findings concluded that "trace amounts of pharmaceuticals entering wastewater treatment facilities are so low that an adult would have to consume a half a gallon of water a day for almost a year to ingest the equivalent of a single minimal dose of the drugs." *Id.* For now, any effect of trace pharmaceuticals in the water supply would seem to only pose a limited threat to lower chain aquatic life, such as microorganisms that serve as a source of an aquatic ecosystem's food chain. However, the enviros would have you believe that the threat is more dire. *Id.* Additional information about this issue should be available soon: the EPA is currently "working on a study of fish tissue – examining for the presence of 35 different pharmaceuticals in the tissue – near effluent areas in five large cities, with the results expected out this summer [of 2008]." InsideEPA.com. "Utilities Hope Study Tempers Concerns Over Pharmaceuticals in Water". May 19, 2008. However, the pharma-water debate is going to be a chronic source of media, regulatory and litigation attention for many years to come.

### B. Other Contamination

The start of May, 2008, brought with it the largest lawsuit settlement yet "over the use of the gasoline additive **MTBE**, a potential carcinogen that has been found in drinking water." Yahoo.finance.com "Oil Companies Agree to Settle MTBE Contamination Lawsuits". May 7, 2008. Valero Energy and Chevron confirmed that they are among a number of oil companies that "agreed to pay \$423 million plus cleanup costs to settle groundwater contamination litigation involving 153 public water providers in 17 states." Interestingly, the cost of future clean-up was, as the author understands it, accepted by the settling defendants in principle, but the price tag (estimated to be as high as in the neighborhood of \$30B) will have to await its own evolution. The settlement was not a clean sweep for the Plaintiffs, as oil giant ExxonMobil and five (5) other companies declined to settle. *Id.* However, after multiple state filings, their consolidation into an MDL proceeding, and years of discovery wrangling and motion practice, several major players found reason to settle, thus putting fresh financing in the pockets of Plaintiff's counsel to fund both this and other water-related litigation. The

author believes that Plaintiffs' counsel will continue to cycle through the membership rolls of water-related trade organizations as the American Water Works Association (AWWA) and the like to mine new clients, new cases, and to promote new theories of liability.

## VI. AIR POLLUTION

As a greenhouse gas, an increased level of carbon dioxide in the atmosphere has been blamed for contributing to the global warming effect. CO<sub>2</sub>, as we were taught in high school, is an essential component for plant life through photosynthesis. Nevertheless, the U.S. Supreme Court designated the gas as a pollutant under the Clean Air Act last year. <http://www.antara.co.id/en/arc/2008/5/21/us-epa-chief-sketches.process-for-greenhouse-gas-rules/>. A recent study confirmed the findings that CO<sub>2</sub> does act as a pollutant even though it "doesn't directly affect respiration." CO<sub>2</sub> Rise Linked to Pollution Deaths, USA Today, February 27, 2008. A researcher from Stanford University predicts that increased atmospheric CO<sub>2</sub> from the burning of fossil fuels will cause an increase in surface temperatures, and that "each 1.8° rise in temperature could increase yearly air pollution deaths in the USA by about 1,000" – a number that translates to 22,000 deaths worldwide. *Id.*

Additionally, as previous Section programs have discussed, the particulate matter in soot and diesel exhaust continues to be a concern to the author. With the increase in ridership of mass transit due to higher gas prices (particularly in locations where diesel-powered buses are still available), and the continuing string of wild fires across the West and southeast, litigation over the physical fallout of particulate matter will increase.

## VII. FOOD POISONING/RECALLS

The leading cause of food recalls is faulty labeling, not contamination. "The failure to list allergens on labels... accounted for half the FDA's most serious food recalls in 2007. It has ranked on top for at least the past three years." Recalls Often Cite Faulty Ingredient Lists, USA Today, December 27, 2007. Wheat, milk, eggs, fish and peanuts are among the most common and serious allergies. According to the Agency, allergic reactions are responsible for about 150 deaths and 30,000 trips to the emergency room each year. *Id.*

Contamination, however, does play a role in some food recalls. As discussed earlier in the section on Chinese imports, Menu Foods' melamine-tainted pet food debacle is a tragic example of a recall coming too late. Around the same time, the FDA also restricted "five types of Chinese-raised seafood because many were found to be contaminated with chemicals not allowed in food in the USA." Contamination Harms People and Pets, USA Today, December 23, 2007. Containing the contamination before it arrives on store shelves is arguably the best way to deal with the problem, but that can not happen in every case. *E. coli* contamination is probably the most notorious culprit, responsible for millions of pounds worth of beef recalls every year. The largest beef recall in U.S. history stands at 143 million pounds, was ordered back in February, 2008,

and it was completely precautionary. USDA Orders Largest Beef Recall: 143.4 Million Pounds, USA Today, February 18, 2008. The recall stemmed from Hallmark/Westland Meat Packing in California. An undercover Humane Society worker infiltrated the facility and videotaped the improper handling and butchering of downer cattle, so-called because of their inability to walk to slaughter. *Id.* Such cattle are thought to pose a greater risk of carrying toxins like *E. coli*, or even worse, mad cow disease. Although the U.S. Department of Agriculture acknowledged that most of the beef had likely already been consumed and classified any consumer risk as “remote”, a recall was nevertheless ordered. Impact of Beef Recall Widens, USA Today, February 2, 2008. Once again, this episode raises troubling questions over the improper monitoring of and compliance with various applicable standards, which violations are often used as grounds to assert civil and punitive liability against sellers within the chain of commerce. In addition to litigation concerns, such revelations often spur legislative officials to action, adding to the compliance woes of our corporate clients. Constant reports of food contamination, coupled with the American public’s growing lack of confidence in both the U.S. and international food supply chain, spell continuing litigation woes for food suppliers in this country.

### **VIII. MISCELLANEOUS ISSUES IN THE WIND**

Of course, it is impossible to predict with any exactitude what the next waves of toxic tort litigation will be. This paper addresses but a few of the possibilities. In addition to the foregoing, the author believes the following issues may present themselves as potential areas of concern.

- 1) Going green
- 2) MRSA virus
- 3) Genetic modification
- 4) California Proposition 65 Maximum Allowable Dose Levels (MADLs)
- 5) Diacetyl—Buttered Popcorn Litigation
- 6) Perfluorochemicals (PFCs)
- 7) Concentrated Animal Feeding Operations (CAFOs)
- 8) Medical Monitoring

The Plaintiffs’ bar and their supportive advocacy groups continue to mine new and fertile subjects for litigation. As the first decade of the new Millennium comes to a close, the toxic tort litigation Juggernaut rolls on! This article presents a few examples of what the trends emerging of toxic tort litigation might be.